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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re NFE, Inc.

Serial No. 76/218,190

Arthur G. Yeager for NFE, Inc.

Tanya Amos, Trademark Examining Attorney, Law Office 101
(Angela Wilson, Managing Attorney).

Before Simms, Holtzman and Drost, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

NFE, Inc. ("applicant"), a Florida corporation, has
appealed from the final refusal of the Trademark Examining
Attorney to register the mark PUMP GUARD ("GUARD"
disclaimed pursuant to request) for enclosures in the
nature of fiberglass laminate material with and without
insulation for environmental protection of above ground

pumps and plumbing of water supply systems.¹ The Examining Attorney has refused registration under Section 2(e)(1) of the Act, 15 USC §1052(e)(1), arguing that applicant's mark PUMP GUARD merely describes an enclosure that provides protection for pumps.² Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

Relying upon dictionary definitions of the words "pump" ("a machine or device for raising, compressing, or transferring fluids") and "guard" ("an attachment or a covering put on a machine to protect the operator or a part of the machine"),³ the Examining Attorney argues that, given the use and purpose of applicant's enclosures for protecting pumps, the mark PUMP GUARD merely describes "guards" or protective coverings for pumps. While the Examining Attorney acknowledges that a mark which combines descriptive terms may be registrable if the composite term creates a unitary mark with a separate nondescriptive meaning or a new and different commercial impression, here

¹ Application Serial No. 76/218,190, filed March 2, 2001, based upon allegations of use since October 19, 2000. Applicant has claimed ownership of Registration No. 2,252,261, issued June 15, 1999, for the mark VALVE GUARD for enclosures for covering, securing and otherwise protecting exterior plumbing assemblies.

² The Examining Attorney has withdrawn a refusal to register under Section 2(d) on the basis of Registration No. 1,837,764, issued May 31, 1994, for the mark PUMP GUARD and design for electrical control panels comprised of thermal circuit protector, alarm panel, indicator light panel, electrical box, switch box and motor control.

³ From The American Heritage Dictionary of the English Language (1994).

the Examining Attorney contends that the combined words do not have a separate nondescriptive meaning.

The Examining Attorney has made of record numerous third-party registrations where the words "PUMP" and "GUARD" have been disclaimed, as well as evidence from the Internet. For example, a search on the Google search engine for the words "pump guard" reveals a number of Google summaries of Web sites containing these words. Some of the many excerpts are reproduced below:

Devol Water/Oil Pump Guard has a work hardened leading edge. This guard is designed to absorb unusual punishment..."

RE Prescott Company - Pumps, Controls, Water Treatment,...

"...the heart of every complete system should be a PUMP GUARD. The PUMP GUARD is an electrical panel which is designed to give superior circuit protection..."

TK Enterprises Home Page

...MONTESA WATER PUMP GUARD (BLACK, GRAY)...

An Oil Seed Press Machine. TabyPressen...

...Johnson Pump Guard PV-1. Protects the pump at dry operations...

...DSP Carbon Fiber Water Pump Guard...

Electric Diaphragm Pumps

...Diaphragm design allows extended dry running, gives good pressure for deckwash. Complete with pump guard...

Eagle Marine Classic

...Heavy duty intake; EZ Clean Intake; QT 100 Steel; Lifting Strakes; Full Swim Platform; Pump guard; Flow thru exhaust system...

Pressure Washer

...Pump Guard protects pump and engine from damage during use and storage...

Genus Marine Online

...A compact, powerful electric diaphragm pump, supplid [sic] with trigger nozzle and pump guard...

Instrumentation

...Jaguar Electronic Controls...Programmable Digital Soft Starter and Jaguar Pump Guard...

Harbercraft--Spirit 2175 XS Extreme

...Rear bench seat with storage; Integrated swim platform with pump guard...

Ride of The Heart - Technical Page

...Rear shock absorber - and improved foot pegs along with a water pump guard have been added - at the courtesy of DualStar...

Custom Weld Viper Outboard

...Swim deck / pump guard...

...Evaporative Coolers...

...operation and clean the water reservoir, float-operated supply valve, water pump guard and all waterways, including the bleed-off system and sump...

Bentz Boats...

...water strainer (between jet intake and engine to trap sand, etc.), railing, pump guard and swim platform fish box...

RideOfTheHeart...

...Mike spent a lot of time working on my bike. He installed a pump guard (protector for the water pump), which replaces the right side engine mount...

Sample Test Questions

...What is the purpose of the pump guard?
Allows operators to turn off pump in

emergency situations; Notifies operators of excessive temperatures...

REGRIGERATOR/FREEZERS

...Has filter screen and removable pump guard been cleaned?

2612 Service Manual

...Be sure all four legs of the machine remain on the table and the pump guard plate is in place, or the pump fitting may strike the tabletop...

...If your vehicle has a fuel pump guard (installed in those models which have a fuel pump and a single 40 cc accumulator on the same bracket)...

...to when a tank or a pipe is empty and fits excellent as a pump guard to prevent dry running or to control the process within for example food manufacturing or...

Among the third-party registrations are the following registered marks, all containing a disclaimer of the word "GUARD": SUN GUARD for fitting boat covers; SPLASH GUARD for a guard in the form of a hard plastic strip designed to fit over molding to prevent paint from dripping on to molding, trim and the floor; SARGIE GUARD for rubber button guards for protecting clothing during pressing; SUPURR GUARD for an exhaust air vent for a dryer, comprised of an exterior guard; and MEGAWARE KEEL GUARD for protection strips to be affixed to the exterior surfaces of boats.

Applicant, on the other hand, argues that its mark is not merely descriptive of an enclosure for protecting a

pump but is only suggestive of such goods because it takes imagination, thought or perception to determine the nature of applicant's goods from the mark. Applicant contends that the mark is not descriptive because it does not describe the structure of or the material used to make its goods. Applicant argues that the evidence of record may show that these words may be descriptive of different goods but not its goods. Applicant also contends that, although it has disclaimed the word "GUARD" as requested by the Examining Attorney, the Board should review the appropriateness of that disclaimer. In this regard, applicant makes note of its ownership of the registered mark VALVE GUARD for enclosures for protecting plumbing assemblies, which issued without a disclaimer of the word "GUARD." Moreover, applicant states that it also makes and sells enclosures for protecting many different devices. Finally, applicant asks us to resolve any doubt in its behalf and to allow publication.⁴

A term is merely descriptive within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea

⁴ With its brief applicant has submitted copies of material previously submitted as well as copies of registrations (where the term "GUARD" has not been disclaimed) not previously made of record. Because the new matter should have been submitted prior to the appeal, we have excluded it from consideration. See Trademark Rule 2.142(d). However, even if we had considered it, it would not have changed the outcome we reach in this case.

of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). In this regard, a term need not immediately convey an idea of each and every specific feature of applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982). Also, whether a term is merely descriptive is determined, not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995); and *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991). That is, the question is not whether someone presented with only the term or phrase could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the term or phrase to convey information about them.

With respect to the various meanings that a term may have and the context of usage, we note what the Court of Appeals for the Federal Circuit observed in *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)(involving the question of the descriptiveness of the word "ULTIMATE"):

In the complex world of etymology, connotation, syntax, and meaning, a term may possess elements of suggestiveness and descriptiveness at the same time. No clean boundaries separate these legal categories. Rather, a term may slide along the continuum between suggestiveness and descriptiveness depending on usage, context, and other factors that affect the relevant public's perception of the term. See Zatarains, Inc. v. Oak Grove Smoke House, Inc., 698 F.2d 786 (5th Cir. 1983) ("These categories, like the tones in a spectrum, tend to blur at the edges and merge together. The labels are more advisory than definitional, more like guidelines than pigeonholes."). The term ULTIMATE has some elements of suggestiveness because it does not define any particular characteristic and requires the exercise of some imagination in order to reach a conclusion about the nature of the recited goods. On the other hand, ULTIMATE also has some elements of descriptiveness because it has a laudatory or puffing connotation. The Board, however, has the duty to place this term in its proper context within the mark and to determine the public's perception...

...As discussed above, the term ULTIMATE may tilt toward suggestiveness or descriptiveness depending on context and any other factor affecting public perception. The Board must decide each case on its own merits. In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1127, 227 USPQ 417, 424 (Fed. Cir. 1985)...

Here, the excerpts from the Internet which the Examining Attorney has made of record show that the words "pump guard" are used as a part of trademarks of third parties as well as descriptive or generic terms used to describe or name goods in various fields of endeavor. Although the summaries are brief, it appears from some of them that when these words are used in lower case and not as part of trademarks, they are being used to describe or name goods in completely different fields (deckwashing equipment; automobile, motorcycle and motor boat applications; evaporative coolers; refrigerators and freezers, etc.). The goods being described in other excerpts or summaries are difficult, if not impossible, to ascertain. Moreover, the third-party registrations made of record by the Examining Attorney, where the word "GUARD" has been disclaimed, are for unrelated goods. Accordingly, we have given little weight to the Internet evidence and the third-party registrations.

More important, we believe, is one of the dictionary definitions of "guard" made of record by the Examining Attorney--"an attachment or a covering put on a machine to protect the operator or a part of the machine".⁵ It is

⁵ Applicant has also disclaimed this word, an indication that applicant has admitted its descriptiveness in relation to its goods. While applicant has asked the Board to reconsider the appropriateness of the

clear that applicant's goods are enclosures for the protection of pumps for water supply systems. Because a "guard" includes a covering placed on a machine to protect it, and since this meaning of the word describes applicant's goods--they are guards for water pumps--we believe that, in relation to applicant's goods, the mark here sought to be registered merely describes applicant's enclosures for protecting water pumps. Contrary to applicant's argument, we do not believe that much imagination, thought or perception is needed to determine the nature of applicant's goods from the mark PUMP GUARD. Accordingly, we agree with the Examining Attorney that, as used on or in connection with applicant's pumps, the term PUMP GUARD is likely to be perceived as a term which merely describes a characteristic, feature or purpose of applicant's goods.

Decision: The refusal to register is affirmed.

disclaimer, suffice it to say that applicant has not requested that the disclaimer be withdrawn.